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Nos. 141-154

In the Supreme Court of the United States

OCTOBER TERM, 1930

HILARY HALBERT, JR.; DOROTHY HALBERT HUBBLE; MILDRED HALBERT, A MINOR, BY HILARY H. HALBERT, GUARDIAN AD LITEM; AND FIFTY-ONE OTHERS, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 633–670) are reported in 38 F. (2d) 795–807.

The opinion of the District Court for the Western District of Washington (R. 285–375) is not reported.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered February 24, 1930. (R. 670–685.) A petition for rehearing was denied March 31, 1930. (R.

685.) Petition for certiorari was filed May 22, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is a fish-eating Indian of the Pacific Coast, as such, entitled to allotment upon the Quinaielt Indian Reservation in the State of Washington under the Treaty with the Quinaielt and Quillehute Indians of July 1, 1855, and January 25, 1856, the Executive Order of November 4, 1873, setting apart the Quinaielt Indian Reservation "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast," the General Allotment Act of February 8, 1887, and the Special Allotment Act of March 4, 1911; or is it a prerequisite to such allotment, under the said Treaty, Executive Order and Allotment Acts, and the Act of August 15, 1894, as amended by the Act of February 6, 1901, authorizing these suits, that the said Indian shall establish—

First, that he is a recognized member of the tribe to which he claims to belong, either by blood or by adoption;

Second, that such tribe is either the Quinaielt, the Quillehute, or some of the other tribes of Indians mentioned in the Special Allotment Act of 1911 as being affiliated with the Quinaielts and Quillehutes in the treaty with said Indians concluded on July 1, 1855, and January 25, 1856;

Third, that he resides either upon the Quinaielt Indian Reservation, or upon some of the smaller Reservations created for the other tribes which are mentioned in said Act of 1911; and

Fourth, that he has applied to the Secretary of the Interior for an allotment upon the Quinaielt Reservation as a member of the tribe to which he claims to belong and that the same has been denied.

2. Is any such Indian entitled to an allotment upon the Quinaielt Reservation by reason of the fact that he has been "recognized" by the Quinaielt Indians, notwithstanding the further fact that he is not of Quinaielt Indian blood; or is such "recognition" merely equivalent to an attempted "adoption" which would not be valid unless it was approved by the Secretary of the Interior? (*Mitchell* v. *United States*, 22 F. (2d) 771.)

3. Are the children or the grandchildren of an Indian woman of one of the tribes affiliated with the Quinaielt and Quillehute Indians in the Treaty of 1855–1856, and a full-blood or mixed-blood Indian of a different tribe, not affiliated with the Quinaielt and Quillehute Indians in said Treaty, who never was "formally adopted" by the Quinaielt Tribe, entitled to allotment upon the Quinaielt Reservation, where the said children or grandchildren, although associating with and "recognized" by the Quinaielt Tribe, were nevertheless never "formally adopted" by said Tribe?

4. Does the Act of June 7, 1897, authorize allotment to the children of a white man and an Indian woman where the said Indian woman has been "adopted" by the Quinaielt Indians, she not being a Quinaielt Indian by blood?

5. Does the Act of June 7, 1897, authorize allotment to the grandchildren of a white man and an Indian woman who was a recognized member of the tribe by blood at the time of her marriage, prior to that date, in the absence of a formal adoption of said grandchildren by the tribe?

TREATY, EXECUTIVE ORDER, AND STATUTES INVOLVED

The treaty with the Quinaielt and Quillehute Indians of 1855–1856, the Executive Order of November 4, 1873, and the pertinent statutes are set out in the Appendix.

STATEMENT

The plaintiffs in these cases brought suit in the District Court for the Western District of Washington under authority of the Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760 (U. S. C., Title 25, Sec. 345), for the purpose of securing allotments upon the Quinaielt Indian Reservation in the State of Washington.

The cases were consolidated for trial (R. 633) and for the purposes of appeal (R. 376).

Originally there were 62 plaintiffs and sixteen cases. The District Court in a memorandum decision covering its several decrees held that all of

the plaintiffs were entitled to allotments (R. 289–375), except the plaintiff in one case (R. 349–351) and six of the plaintiffs in the remaining fifteen cases (R. 358–375).

On appeal by the Government as to the remaining fifteen cases, involving 55 plaintiffs, the Circuit Court of Appeals in four separate decisions (R. 633–670), covering fifteen decrees (R. 670–685), reversed the decrees of the District Court as to the plaintiffs included in the appeal, except that in the case of Archie Pellard (R. 351–357) the decree (R. 84) was reversed with leave to amend the complaint to show, if it be true, that the said Archie Pellard "is entitled to an allotment as a son of a recognized member of the Quinaielt Tribe and of a white man" (R. 645, 674); and that in the case of Lizzie Rolfson et al. the decree of the District Court (R. 160) was affirmed as to Lizzie Rolfson and reversed as to the other plaintiffs (R. 650–653, 683). In the case of Mary Frances Provoe et al. the decree of the District Court (R. 119) was reversed and the case remanded for further proceedings to determine whether the plaintiff, Mary Frances Provoe, is a lower Chehalis Indian, which under stipulation by counsel on both sides would entitle her to allotment (R. 653–670, 684).

Petitioners herein rely mainly upon the theory that they are either fish-eating full-blood Indians of the Pacific Coast or mixed-blood Indians coming under the saving provisions of the Act of 1897

(*infra*, p. 12.) They do not reside upon any reservation, but live in what is styled in the brief in support of the petition "the original tribal habitat of their ancestors," either at Dahlia, Shoalwater Bay, Grays Harbor, or other places in the State of Washington. Some of their relatives, including, in some of the cases, the father or mother, or both, have been enrolled on the Quinaielt roll and allotted on the Quinaielt Reservation. In some of the cases the petitioners rely upon some form of recognition by, and association with, the Quinaielt Indians, although they are not Quinaielt Indians by blood, or if possessing some degree of Quinaielt Indian blood their fathers are not Indians of the Quinaielt Tribe nor of any other tribe mentioned in the Act of 1911 (*infra*, p. 12). In some other cases the petitioners rely on the fact that their mothers were recognized members of the Quinaielt Tribe by adoption, although they themselves are not.

REASONS FOR NOT OPPOSING THE PETITION

While the decisions of the Circuit Court of Appeals were, we believe, right, at least in so far as the conclusions and decrees are concerned, and while we would, under such circumstances, ordinarily oppose a petition for certiorari, we do not do so in these cases for the following reasons:

(1) The questions involved are of public importance. They affect the eligibility for allotment on the Quinaielt Reservation of many Indians on the Pacific Coast. A decision by this Court would ma-

terially aid the Department of the Interior not only in determining what action should be taken with respect to further allotments on the Quinaielt Reservation as well as with respect to those already made thereon but also in determining the rights of other Indians to allotments upon other reservations.

(2) None of the questions involved, so far as they relate to the rights of the Indians to allotments upon the Quinaielt Reservation, appear to have been passed upon by this Court.

(3) With respect to the question of residence as a prerequisite to allotment, there is a seeming, although, we think, not an actual conflict between the decisions of the Circuit Court of Appeals herein and the decision of the same court in *Bonifer* v. *Smith*, 166 Fed. 846, and of this Court in *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401. The question should be finally set at rest.

Respectfully submitted.

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JULY, 1930.

APPENDIX

THE TREATY, EXECUTIVE ORDER, AND STATUTES INVOLVED

The Treaty with the Quinaielt and Quillehute Indians of 1855–1856, 12 Stat. 971, after providing (Article I) for the surrender of the lands and country then occupied by the different tribes and bands of said Indians, and reserving (Article II) "for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use," provided in said Article II:

> And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant.

Article VI of said treaty provides in part as follows (p. 972):

> The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians

> be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, * * * and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 6 of the Treaty with the Omahas, referred to above (10 Stat. 1043, 1044–1045), reads in part as follows:

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to

each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; * * * And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, * * * until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land.

The Executive Order of November 4, 1873 (Kappler, Indian Affairs, Laws and Treaties, Vol. 1, 2d Edition, pp. 923–924), reads as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: [Here follows a description of the reservation.]

The General Allotment Act of February 8, 1887, c. 119, Sec. 1, 24 Stat. 388, as amended (U. S. C., Title 25, Sec. 331), provides as follows:

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

The Special Allotment Act of March 4, 1911, c. 246, 36 Stat. 1345, provides:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided,* That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

The Act of June 7, 1897, c. 3, Sec. 1, 30 Stat. 90, as amended (U. S. C., Title 25, Sec. 184), provides:

> All children born of a marriage solemnized prior to June 7, 1897, between a white man and an Indian woman by blood and not by adoption, where said Indian woman was on that date, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right.

The Act of August 15, 1894, c. 290, Sec. 1, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, Sec. 1, 31 Stat. 760 (U. S. C. Title 25, Sec. 345), reads in part as follows:

> That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit [district] court of the United States; and said circuit [district] courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * * *Provided,* That the right of appeal shall be allowed to either party as in other cases.

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